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October 20, 1993

William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: RM-8334

Dear Mr. Caton:

Transmitted herewith, on behalf of The National Rural Telecom Association, are an original and nine (9) copies of its comments in the above-referenced proceeding.

In the event of any questions concerning this matter, please communicate with this office.

Very truly yours,

*Margot Smiley Humphrey*  
Margot Smiley Humphrey

Enclosure

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Before The  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

AMERICAN TELEPHONE AND )  
TELEGRAPH COMPANY )

Petition for the Establishment )  
of Additional Standards to Govern )  
Study Area Boundary Changes )  
in Connection with the Transfer )  
of Service Territories Between or )  
Among Local Exchange Carriers )

RM-8334

COMMENTS OF THE NATIONAL RURAL TELECOM ASSOCIATION

The National Rural Telecom Association (NRTA), by its attorneys, submits these comments on the Petition for Rulemaking filed September 3, 1993, by American Telephone & Telegraph Company (AT&T). Seeking to control the size of the Universal Service Fund (USF), AT&T requests a rulemaking proceeding to prescribe standards for study area boundary changes occasioned by transfers of local telephone exchanges.

NRTA is an association of local exchange carriers (LECs) that borrow under Rural Electrification Administration (REA) and Rural Telephone Bank (RTB) programs. The programs were enacted to make service available to the "widest practicable number of rural users," through construction, improvement and expansion of facilities. 7 U.S.C. § 921 These REA and RTB borrowers typically serve low density areas, averaging about 6 subscribers per route mile of line, where costs of service are substantially higher than in more densely populated areas.

Lawfully Adopted Joint Board and Commission Policy  
Favors Transfers of High Cost Exchanges

The foundation for AT&T's request for standards that will control the size of the USF in connection with transfers of high cost exchanges is AT&T's claim (p. i) that the frozen study area definition was adopted "to control the growth of the Universal Service Fund ("USF") that could otherwise result from study area boundary changes." Accordingly, AT&T says (pp. 9-10) the Commission should require buyers and sellers to "satisfy specific criteria before obtaining approval of those transactions." The purpose (p. 9) would be to assure that transactions have " 'no adverse effect' on the USF and otherwise serve the public interest."

Although AT&T labors to create the impression that the standards would better implement long-established Joint Board and Commission policy, that is not the case. It is true that the Joint Board and Commission acted in 1984 to prevent companies from "setting up high cost exchanges within their existing service territory as separate companies to maximize high cost support."<sup>1</sup> However, AT&T neglects to mention a far more pertinent purpose stated by the Joint Board and adopted by the Commis-

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<sup>1</sup> MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-256, Recommended Decision and Order, 49 Fed. Reg. 48325 (1984), ¶ 66 (Separations Order), recommendations adopted, Decision and Order, FCC 84-637 (released December 28, 1984). The Commission adopted the Joint Board's reasoning, as well as its recommendations, without changes bearing on the issue raised here.

sion for rejecting the previously-adopted definition requiring consolidation of all commonly-owned study areas within a state. The frozen study area definition, explained the Joint Board, would

remove the disincentive for purchase of high cost companies or expansion of service into high cost areas, which would result from the previously adopted definition.<sup>2</sup>

The Joint Board thus decided to let LECs choose to maintain a separate study area for acquired exchanges, expecting that consolidation would only be chosen when its benefits "exceed the reduction in high cost support."<sup>3</sup> It did not want to discourage the acquisition of high cost exchanges by "penaliz[ing] existing study area customers through the averaging process."<sup>4</sup>

A major purpose of the frozen study area definition, therefore, was to preserve adequate high cost support for acquired high cost areas. AT&T's proposals designed to limit USF availability for acquired high cost exchanges or companies and force the existing and acquired customer base to absorb more upgrade costs in local rates fly in the face of both this unambiguous purpose of the frozen study area definition and the basic rate parity purpose of the USF itself.<sup>5</sup>

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<sup>2</sup> Separations Order at ¶ 66.

<sup>3</sup> Ibid.

<sup>4</sup> Id. at ¶ 65.

<sup>5</sup> See, e.g., id. at ¶ 58.

The Joint Board and Commission have not lawfully changed the policy favoring acquisitions of high cost exchanges. AT&T says (p. 8) the Commission has acknowledged that the current study area procedure is not suited to arms-length sales of local exchanges. Again, it fails to disclose that the pending proposal it cites would remove the waiver or approval requirement for study area changes incident to such transactions in favor of automatic approval absent Commission action.<sup>6</sup> Although the proposal would require a LEC with other exchanges in a state to consolidate them with the acquired exchanges, that proposal remains pending before the Joint Board. Moreover, the proposal would require state acquiescence because of state concern about potential cost shifts to the intrastate jurisdiction.<sup>7</sup>

AT&T cites Common Carrier Bureau orders<sup>8</sup> that have temporarily capped one purchaser's USF and contain language about preventing increases in the USF. However, such orders taken under delegated authority cannot change the established Joint Board and Commission policy of encouraging purchases of high cost exchanges.<sup>9</sup> Indeed, the Commission should not adopt rules to

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<sup>6</sup> Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, FCC 90-306, p. 3, 6-7, ¶¶ 17-19.

<sup>7</sup> Id. at 6-7, ¶¶ 18-19.

<sup>8</sup> AT&T erroneously claims them as Commission actions.

<sup>9</sup> See 47 C.F.R. § 0.291(a)(2) (Common Carrier Bureau delegation does not extend to novel questions that cannot be resolved under existing precedents).

impede the acquisition of high cost exchanges unless the duly adopted policy is changed by a Joint Board proceeding that satisfies the requirements of section 410(c) of the Communications Act.<sup>10</sup>

AT&T also urges (pp. 13-14) the Commission to collect information to support rejection of reentry by acquired exchanges into the NECA traffic sensitive pool to control rate disparity. NRTA agrees that measures are needed to address traffic sensitive rate disparities. However, forcing acquired exchanges to charge stand-alone traffic sensitive rates would discourage competing interexchange carriers from serving their customers and increase disparity between their charges and others', including NECA's rates. That result is out of step with existing rules and policy. The Commission cannot lawfully refuse or condition waivers that are in harmony with the intent of the frozen study area definition in order to rewrite access and separations rules by indirection.

Accordingly, the standards AT&T advocates as a tool to prevent USF and toll rate disparity increases incident to acquisitions and pool reentry are unwarranted.<sup>11</sup>

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<sup>10</sup> The high cost expense adjustment -- i.e. extra allocation of costs to the interstate jurisdiction -- is a separations matter subject to the protection of Section 410(c).

<sup>11</sup> The Common Carrier Bureau appears to be aware of the constraints on its authority: It suggested, but refrained from mandating, data submissions closely resembling AT&T's request in its September 7, 1993 Public Notice (DA 93-1093).

AT&T's Allegations About the Burden on  
Interstate Ratepayers Are Unsupported

AT&T contends (p. 2) that standards are necessary to maintain adequate support "without unduly increasing the USF burden on access ratepayers." It equates this "burden" with potential increases in the total USF, possibly assuming the sale of all price cap company high cost exchanges. It provides no support or explanation for the \$400 million increase it projects for the maximum potential USF increase. AT&T has not even indicated how much the total USF growth from the nineteen pending study area waiver requests would be. As recently as July 23, 1993, AT&T was claiming that the increase would be \$550 million, 1-1/3 times its current claim.<sup>12</sup> The potential "burden" seems to be an unreliable estimate, at best.

Moreover, AT&T and other interexchange carriers pass the "burden" through to their customers. Comments on the Commission's proposal in CC Docket No. 80-286 for a temporary cap or index on the USF establish that the burden on the relevant customers -- the ones that ultimately pay for USF -- is modest and is even decreasing as interstate demand grows. AT&T has not shown that the acquisitions will change this pattern. AT&T has certainly not shown a burden that justifies drastic measures to discourage acquisitions that will improve service for rural customers whose facilities have been neglected under large LEC ownership.

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<sup>12</sup> Support Mechanisms, presented at NARUC Staff Subcommittee Issues Workshop by Roger L. Riggert, p. 4.

AT&T's assertion that small LECs pay premium prices because they will recover the excess in USF is also unreliable. Any excess over depreciated original cost must be assigned to an acquisition adjustment account and treated "below the line" pursuant to Section 32.2005 of the Rules. Below the line costs are not reflected in USF recovery.

AT&T's Proposal Attempts to Establish Backhanded  
Jurisdiction Over Small LEC Acquisitions and Local Rates

AT&T's proposal would require purchasing LECs, primarily "connecting carriers," to furnish data to the Commission so that the Commission could rule, in effect, on whether the transaction would serve the public interest. AT&T would also have the Commission decide whether the purchaser proposed to raise its local rates sufficiently in connection with facilities upgrades.

Such involvement in small LEC and intrastate activities is barred by the Communications Act. Section 152(b)(1) deprives the Commission of jurisdiction over intrastate rates. In addition, Section 152(b) reserves to the states jurisdiction over carriers that provide interstate service only through physical connection with an unaffiliated carrier. The Commission should not prescribe standards and requirements that usurp protected state jurisdiction.

Conclusion

AT&T's petition seeks standards to burden or prevent transactions which are consistent with the express purpose of duly adopted Joint Board and Commission policy. It seeks to hamper acquisitions and upgrades that will bring modern service to

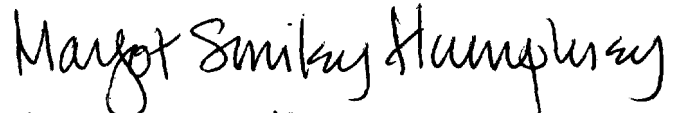


affected rural consumers, although the USF "burden" on the customers that actually absorb the cost in rates has neither been growing nor hampering robust growth in demand. AT&T also seeks to change separations policy without Joint Board participation and to interject the Commission into the merits of exchange acquisitions and local rates, despite statutory limits on its authority.

Accordingly, the Commission should (1) reject AT&T's request for rulemaking and (2) process requests for study area waivers on an expedited basis without abusing the waiver process to change duly established and publicly beneficial separations or access policies, unless and until such separations and access rules are lawfully revised.

Respectfully submitted,

NATIONAL RURAL TELECOM ASSOCIATION



By: /s/ Margot Smiley Humphrey  
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Its attorneys

October 20, 1993

CERTIFICATE OF SERVICE

I, Richard D. Massie, a secretary in the law firm of Koteen & Naftalin, do hereby certify that four copies of the foregoing "Comments of the National Rural Telecom Association" were sent by first class U.S. mail, postage prepaid, on this 20th day of October, 1993, to the offices of the following:

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Room 3244J1  
Basking Ridge, NJ 07920

  
/s/ Richard D. Massie  
/s/ Richard D. Massie